RECEIVED
MAR 10 1982
CLERK
SUPREME COURT, U.S.

No. 81-6352

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

MARTIN R. GOLD
HOWARD L. WIEDER
PAUL V. LiCALSI
JANE G. STEVENS
595 Madison Avenue
New York, New York 10022

Attorneys for Petitioner

QUESTIONS PRESENTED

1. WHETHER A CONVICTION IN A CAPITAL CASE BASED SOLELY UPON A CONFESSION AND EVIDENCE DERIVED THEREFROM WAS OBTAINED IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHERE THE CONFESSION WAS OBTAINED UNDER THE FOLLOWING CIRCUMSTANCES:

A. IT WAS MADE AFTER 18 HOURS OF INTERROGATION CONDUCTED WITHOUT INFORMING PETITIONER THAT HIS ATTORNEY'S REPEATED ATTEMPTS TO COMMUNICATE WITH HIM HAD BEEN UNSUCCESSFUL BECAUSE LAW ENFORCEMENT OFFICIALS HAD LIED TO THE ATTORNEY AS TO PETITIONER'S WHEREABOUTS.

B. THE ALLEGED PROBABLE CAUSE FOR PETITIONER'S ARREST, AS CREDITED BY THE GEORGIA COURTS, CONSISTED SOLELY OF THE FACT THAT PETITIONER WAS A BLACK SOLDIER ON A MILITARY BASE WHO HAD BEEN SEEN WITH A PROSTITUTE IN A LOCAL BAR, ON THE BASIS OF WHICH THE UNITED STATES ARMY COURT OF MILITARY REVIEW HAS HELD THE SAME ARREST IMPROPER AND THE CONFESSION INADMISSIBLE?

2. WAS PETITIONER DENIED DUE PROCESS OF LAW AND THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN THE COURT FAILED TO CONDUCT ANY INQUIRY AS TO PETITIONER'S MENTAL COMPETENCE TO STAND TRIAL, OR TO CONDUCT ANY MEANINGFUL INQUIRY ON HIS DEMAND TO ACT AS HIS OWN LEAD COUNSEL WHEN THE FOLLOWING APPEARED:

A. THE CRIME CHARGED AND THE SURROUNDING FACTS SUGGEST THE ACTIONS OF A SEVERELY MENTALLY DISTURBED PERSON;

B. A CLINICAL PSYCHOLOGIST REPORTED, IN PART:

"MY IMPRESSION TO DATE IS THAT MR. HANCE MAY NOT BE CAPABLE OF ASSISTING IN AN APPROPRIATE, RATIONAL WAY IN HIS OWN DEFENSE.";

(C) THE STATE PSYCHOLOGIST (WHO CONCLUDED THAT PETITIONER WAS COMPETENT TO STAND TRIAL) REPORTED, IN PART:

"[PERSONS SUFFERING FROM PETITIONER'S MALADY] TEND NOT TO BE PARTICULARLY ABLE TO THINK FOR THEMSELVES AND THEIR EMOTIONAL DIFFICULTIES FREQUENTLY INTERFERE WITH THEIR JUDGMENT SUCH THAT THEY OFTEN APPEAR TO LACK COMMON SENSE IN EVERYDAY MATTERS."?

3. WAS PETITIONER DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS WHERE ASSIGNED COUNSEL, INTER ALIA, FAILED TO PRESENT AN INSANITY DEFENSE; RAISE ANY PRE-TRIAL CHALLENGE TO THE LEGALITY OF PETITIONER'S ARREST; CONTEST BY EVIDENCE THE CRITICAL ISSUE OF THE LACK OF THE COURT'S JURISDICTION AND THE IMPROPRIETY OF THE VENUE OF THE TRIAL; OBJECT TO THE ADMISSION OF A TEN-YEAR-OLD ARREST ON SIMILAR FACTS; OBJECT TO THE ADMISSION OF CORPSE FRAGMENTS AND OTHER INFLAMMATORY EVIDENCE; OBJECT TO IMPROPER AND PREJUDICIAL ARGUMENT BY THE STATE ON SUMMATION; OR OBJECT TO THE PATENTLY ERRONEOUS CHARGES BY THE COURT THAT DEFENDANT IS PRESUMED TO BE OF SOUND MIND AND INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS, AND THAT MALICE SHALL BE IMPLIED?

4. WHETHER, DURING THE SENTENCING PHASE OF TRIAL, WHERE THE JURY WAS TO CONSIDER THE DEATH PENALTY, THE ORDER OF THE COURT ABSOLUTELY BARRING PETITIONER FROM INTRODUCING ANY EVIDENCE REGARDING HIS STATE OF MIND AT THE COMMISSION OF THE CRIME AND AT TRIAL VIOLATED PETITIONER'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS IN CAPITAL CASES?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	v
CITATION TO OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	35
I. WHERE THE GEORGIA COURTS AND U.S. MILITARY COURTS HAVE REACHED CONTRARY CONCLUSIONS ON THE SAME FACTS AS TO THE LEGALITY OF PETITIONER'S ARREST AND WHETHER HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS WERE VIOLATED, THIS COURT SHOULD RESOLVE THE CONFLICT	35
II. A CONFESSION TAKEN FROM A DEFENDANT WHO IS NOT TOLD BY LAW ENFORCEMENT OFFICIALS BEFORE CONFESSING THAT HIS LAWYER TRIED TO SEE HIM BUT WAS UNSUCCESSFUL BECAUSE THEY LIED TO HIS ATTORNEY SHOULD BE EXCLUDED PURSUANT TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS	42
III. DESPITE STRONG EVIDENCE OF MENTAL IMBALANCE, THE COURT FAILED TO INQUIRE AS TO PETITIONER'S COMPETENCE TO STAND TRIAL, OR TO QUESTION HIS DEMAND TO BE HIS OWN LEAD COUNSEL, ALL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS	45
IV. IN A CAPITAL CASE, PETITIONER WAS GIVEN THE HELP OF COUNSEL WHOSE LEVEL OF PERFORMANCE FELL CRITICALLY BELOW EFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS	50
V. THE ORDER OF THE COURT ABSOLUTELY BARRING EVIDENCE OF PETITIONER'S MENTAL STATE OFFERED IN MITIGATION AT A DEATH PENALTY HEARING VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS	53
CONCLUSION	55

Page

APPENDICES

VOLUME I WITH INDEX OF APPENDICES . . . . . Separately Presented [S. Ct. Rule 21.1(K)]

VOLUME II WITH INDEX OF APPENDICES . . . . Separately Presented [S. Ct. Rule 21.1(K)]

TABLE OF AUTHORITIES

Cases	Page
Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982)	46
Anders v. California, 386 U.S. 738 (1967)	50
Beasley v. United States, 491 F.2d 687 (6th Cir. 1974)	51
Blackburn v. Alabama, 361 U.S. 199 (1960)	40
Brown v. Illinois, 422 U.S. 590 (1975)	36, 38, 39, 40, 41
Carnley v. Cochran, 369 U.S. 506 (1962)	48
Chavez v. United States, 656 F.2d 512 (9th Cir. 1981)	46
Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969)	43
Commonwealth v. Yates, 467 Pa. 362, 357 A.2d 134 (1976)	43, 45
Darwin v. Connecticut, 391 U.S. 346 (1968)	44
Drope v. Missouri, 420 U.S. 162 (1975)	46, 47
Dunaway v. New York, 442 U.S. 200 (1979)	36, 38, 39, 40, 41
Dusky v. United States, 362 U.S. 402 (1960)	47
Dyer v. Crisp, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980)	51
Eddings v. Oklahoma, ___ U.S. ___, 102 S. Ct. 869 (1982)	54,55
Eisen v. Picard, 452 F.2d 860 (1st Cir. 1971), cert. denied, 406 U.S. 950 (1972)	40

Cases	Page
Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981)	51
Escobedo v. Illinois, 378 U.S. 478 (1964)	42, 43, 45
Faretta v. California, 422 U.S. 806 (1975)	23, 50
Gideon v. Wainwright, 372 U.S. 335 (1963)	50
Gregg v. Georgia, 428 U.S. 153 (1976)	54
Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067 (1980), reh'g denied, 449 U.S. 1135 (1981)	2, 3, 6-7, 9, 10, 11, 14, 33, 37, 39
Harris v. South Carolina, 338 U.S. 68 (1948)	44
Johnson v. Zerbst, 304 U.S. 458 (1938)	45, 48, 49
Lego v. Twomey, 404 U.S. 477 (1972)	45
Lockett v. Ohio, 438 U.S. 586 (1978)	54
MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961)	51, 53
Maryland v. Marzullo, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978)	50, 51, 53
Miranda v. Arizona, 384 U.S. 436 (1966)	9, 23, 38, 39, 40, 43, 44, 45
McMann v. Richardson, 397 U.S. 759 (1970)	50
Mullaney v. Wilber, 421 U.S. 682 (1975)	33
Pate v. Robinson, 383 U.S. 375 (1966)	45, 46, 47, 48

Cases — Page

People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) 42, 44

Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974) 53

Powell v. Alabama, 287 U.S. 45 (1932) 50

Rawlings v. Kentucky, 448 U.S. 98 (1980) 39

Sandstrom v. Montana, 442 U.S. 510 (1979) 32

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 39

State v. Deputy, 433 A.2d 1040 (Del. 1981) 39

State v. Jackson, 303 So.2d 734 (La. 1974) 43

State v. Johns, 185 Neb. 590, 177 N.W.2d 580 (1970) 43

Stone v. Powell, 428 U.S. 465 (1975) 36

Twitty v. Smith, 614 F.2d 325 (2d Cir. 1979) 52

United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) 51

United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), after remand aff'd en banc, 624 F.2d 196 (D.C. Cir. 1979) 51

United States v. Donn, 661 F.2d 820 (9th Cir. 1981) 51

United States v. Hance, 10 M.J. 622 (A.C.M.R. 1980) 1, 7-8, 9, 10, 11, 36, 37, 39, 41, 42

United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977) 24

United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979) 39

Cases	Page
United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950)	52
United States ex rel. Johnson v. Johnson, 531 F.2d 169 (3d Cir.), cert. denied, 425 U.S. 997 (1976)	51
United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975)	52
Westbrook v. Arizona, 384 U.S. 150 (1966)	48, 49
Wong Sun v. United States, 371 U.S. 471 (1963)	36, 39
United States Constitutional Provisions	
U.S. Const. amend. IV	2, 35, 36
U.S. Const. amend. V	2, 42, 45
U.S. Const. amend. VI	2, 24, 42, 45, 50, 53
U.S. Const. amend. VIII	2, 24, 53, 54
U.S. Const. amend. XIV	2, 24, 35, 42, 45, 50, 53
United States Statutory Provisions	
18 U.S.C. § 1111	24
28 U.S.C. § 1257(3)	2
State Statutory Provisions	
Ga. Code § 26-1101	32-33
Related Authorities	
American Law Institute, Model Penal Code of Pre-Arraignment Procedure § 140.7 (1975)	44

No. 81 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Petitioner William Henry Hance respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of Butts County in this capital case.

CITATION TO OPINIONS BELOW

The Order of the Superior Court of Butts County, entered July 29, 1981, dismissing the habeas corpus petition, and the Order of the Supreme Court of Georgia, entered October 9, 1981, denying a certificate of probable cause to appeal, have not been published in the official reports, but are contained in the separately bound Appendices to the instant petition. Prior opinions integral to this case are United States v. Hance, 10

M.J. 622 (A.C.M.R. 1980), and Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067 (1980), reh'g denied, 449 U.S. 1135 (1981), and copies of both opinions are also contained in the Appendices.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and herein the deprivation of rights secured by the Constitution of the United States. The judgment of the Supreme Court of Georgia on direct appeal, affirming petitioner's conviction of murder and attempted theft by extortion, was entered on June 24, 1980. A timely petition for rehearing was denied by that court on July 15, 1980. This Court denied certiorari on December 15, 1980, and a timely petition for rehearing on January 26, 1981. The Superior Court of Butts County, Georgia, dismissed the habeas corpus petition in an order entered July 29, 1981. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on October 9, 1981. On December 23, 1981, Mr. Justice Powell, upon consideration of the application of counsel for petitioner, ordered that the time for filing a petition for writ of certiorari be extended to and including March 8, 1982. On March 8, 1982, petitioner filed this petition for a writ of certiorari in a timely manner pursuant to Rule 28.2 of the Rules of this Court, and a motion to proceed in forma pauperis, accompanied by supporting affidavits pursuant to Rule 46 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United

States. Their pertinent parts are included in the Appendices.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the Superior Court of Butts County, Georgia from its dismissal of petitioner's writ of habeas corpus.

On December 16, 1978, petitioner, a soldier stationed at Fort Benning, Georgia, was sentenced to death for the murder of Gail Jackson. The conviction was affirmed by the Supreme Court of Georgia [Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)], and this Court denied certiorari and a rehearing [449 U.S. 1067 (1980), reh'g denied, 449 U.S. 1135 (1981)].

The sole evidence against petitioner was his own confession and its subsequent corroboration. The confession was obtained by military and civilian investigators, working together, after eighteen hours of interrogation. During that confession, petitioner admitted to having murdered three women.

He was convicted of two of these murders by a military court, but the United States Army Court of Military Review reversed, holding that there was no probable cause to support the arrest which led to the intensive interrogation of petitioner. Use of the same confession in petitioner's trial for the death of Gail Jackson has not troubled the Georgia courts despite the paucity of probable cause to support petitioner's arrest, and the fact that the confession followed eighteen hours of questioning during which petitioner's lawyer repeatedly tried to contact him. Petitioner's lawyer was unable to do so because law enforcement officials lied to the attorney as to petitioner's whereabouts, and failed to advise petitioner that his attorney was seeking to confer with him.

The brutal and irrational murders, letters to the police sent by the "Forces of Evil," and other surrounding circumstances clearly suggest a mental aberration by the perpetrator. Psychiatric evaluations of petitioner raised serious questions as to his sanity. The court, however, failed to make any inquiry as to his competency to stand trial, and made only a perfunctory inquiry when allowing petitioner to act as his own lead counsel.

The trial was incompetently defended by petitioner and his assigned counsel. Fundamental rights and elementary objections were waived. Finally, at the trial on sentence, the court barred petitioner from introducing any evidence on his state of mind at the time of the commission of the crime.

The Lack Of Probable Cause

Between March 3 and April 5, 1978, when a series of strangulation murders were occuring in Columbus, Georgia (Tr. 834), its Police Chief received a series of six letters containing ravings from "The Forces of Evil" (Tr. 428-33, 435-36, 445-47, 449, 452-53).* All the letters were handprinted and most of them were written on and mailed in United States Army stationery with a written return address for the "Forces of Evil" (See State's Exhibits 1-6, contained in Appendices). Army stationery is easily available to all service people (Tr. 846), and military personnel are quite common in Columbus, which is near Fort Benning. The letters, reproduced in full in the Appendices, clearly reflect the writer's highly disturbed and unstable mind. The

---

* "Tr." references are to the transcript of the petitioner's civilian trial of December 11-16, 1978, in the Superior Court of Muscogee County, Georgia.

writer, speaking as "The Chairman of All the Forces of Evil" (see, e.g., Tr. 430, State's Exh. 2), threatened that, unless the Police Chief captured the stocking strangler, he would be forced to kill black women in Columbus, including two women whom, the writer alleged, the "Forces" had been holding captive.

On the afternoon of March 30, a caller, who sounded like a black male, made two telephone calls, one to the military police desk at Fort Benning and the other to the Columbus Police Department, specifying the place where the body of Gail Jackson might be found. The caller used the Sand Hill Bar and Grill as a geographical reference and for distance measurement used the term of "meters" (Tr. 459-61, 463, 466, 468, 471-73, 475). The body was found at the described location (Tr. 488).

On April 3, 1978, a caller, who sounded like a black male and who identified himself as a member of the "Forces of Evil," telephoned the military police desk at Fort Benning and said that Irene Thirkield's body may be found at Maertens Range on Fort Benning (Tr. 626). The body was found at the specified location (Tr. 631).

Agent Richard Fox, of the U.S. Army Central Investigation Division ["C.I.D."], talked to "a girl named Peaches" who said she once saw the deceased Irene with the petitioner -- who was a black male soldier stationed at Fort Benning (Tr. 727-28). Agent Fox testified at the suppression hearing conducted during trial outside the presence of the jury:

> [Mr. Hance:] Mr. Fox, would you tell the Court what you did have on me as far as I was concerned before my name got on that confession?
>
> A. I had been -- I received information that you had given Irene a ride to the Sand Hill Bar.

Q. I'm talking about as far as I was concerned besides that?

A. Nothing.

(Tr. 697-98)

At trial, but not during the suppression hearing, the State produced a witness, Deborah Jones, who stated that she saw the petitioner and Irene at a bar on March 15, 1978 (Tr. 606, 610-11). The State then produced three other witnesses, none of whom could identify petitioner as the uniformed soldier who was with Irene that evening (Tr. 614, 618, 620-21). One of these witnesses, Johnny King, testified that the soldier and Irene gave him a lift before they continued in the direction of another bar (Tr. 623). There is no evidence that any law enforcement agent spoke with Deborah Jones or the three other witnesses who could not identify petitioner prior to petitioner's arrest or seizure. Fox's information came from only "Peaches," who was not brought to court to testify. Petitioner was then arrested and, in the three-day interrogation that followed, confessed to the homicides of Brenda Gail Faison (also known as "Gail Jackson"), Irene Thirkield, and Karen Hickman.

The Supreme Court of Georgia Found
Probable Cause For Petitioner's Arrest

On these facts, the Supreme Court of Georgia found probable cause for appellant's arrest. The Court said:

> Agents of the military police were in possession of the following information prior to appellant's arrest. First, from the phone calls they knew the person who killed the victims was a young black male. Second, they knew that the perpetrator was a soldier because the calls they received showed an intimate knowledge of the military reservation

> and the letters were written on military stationery. Also, a military cap was found near one of the bodies. Finally, they knew that the appellant, a young black male soldier, was the last person seen with a victim prior to her death. Such information would lead a reasonably cautious person to believe that appellant had committed the offense, thereby furnishing probable cause for his arrest.

Hance v. State, 245 Ga. 856, 864, 268 S.E.2d 339, 347, cert. denied, 449 U.S. 1067 (1980).

The United States Army Court Of Military Review Found There Was No Probable Cause For Petitioner's Arrest

Following his civilian trial for the homicide of Gail Jackson, petitioner was tried by the Army on May 15 - June 8, 1979, for the deaths of Irene Thirkield and Karen Hickman. He was convicted on June 8, 1979, and sentenced to hard labor for life. The evidence for the two murder charges in the military trial consisted of the identical facts involving probable cause, the same interrogation, and the ensuing confessions as in the state court trial. The federal military appellate court reversed the convictions. The court held:

> We are not satisfied that the evidence presented by the Government was sufficient to warrant a prudent person in concluding that the apellant had committed an offense. The information certainly warranted additional questioning but fell short of establishing probable cause to arrest the appellant.
>
> * * *
>
> The Government has failed to establish the legality of the appellant's apprehension and has not demonstrated that this taint was dissipated. The resulting confessions and other derivative evidence therefore were inadmissible.

United States v. Hance, 10 M.J. 622, 625, 627 (A.C.M.R. 1980) (footnote references omitted) (copy of opinion contained in Appendices). The court, rather than dismiss the charges, remanded the case for a rehearing as to probable cause because the Government contended it had an additional proffer of evidence on the subject consisting of an alleged identification of petitioner's voice by his commanding officers. The Army, however, decided to dismiss the charges against petitioner.

The State Habeas Corpus Proceeding

The matter of the voice identification was introduced at the state habeas corpus proceeding. Former C.I.D. Agent Marvin Besson testified that the telephone call made on April 3, described above, to the military police desk had been tape-recorded [Transcript of State Habeas Corpus Proceeding of April 8, 1981, at 19 (hereinafter "Habeas Transcript")]. Later that afternoon or evening, the C.I.D. learned that petitioner had been seen once with one of the deceased women (id. at 18, 20). Based on this information supplied by "Peaches," Besson, the next morning of April 4, called petitioner's commanding officer and first sergeant to C.I.D. headquarters and played the tape recording for them. According to Besson, while "they felt it was Hance's voice," they could not say so with certainty, and the recorded sounds had no outstanding or distinguishing characteristic (id. at 19, 21, 24, 50-51). The State failed to call petitioner's commanding officer or first sergeant to testify. Agent Besson testified at the military trial that the uncertain identification of the telephone recording and the information that petitioner had been seen with one of the deceased

women, did not constitute probable cause for the petitioner's arrest on April 4 (United States v. Hance, supra at 625 n.5).

The state habeas corpus court was concerned by the probable cause issue. After Besson testified as to the sparse information in his possession, the court stated: "Well, I didn't understand why you and Mr. Fox thought Mr. Hance had anything to do with it" (Habeas Transcript at 23; accord, id. at 43-44). The court made no new findings of fact; it merely cited the Georgia Supreme Court's opinion, quoted above, finding that the arrest was based on probable cause and that petitioner had been given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Order of Superior Court of Butts County, entered July 29, 1981, at 2, ¶¶ 7-8, and 12, ¶ 2 (contained in Appendices).

The issue of probable cause was properly preserved at trial by the legally untrained petitioner himself who argued to both the court and the jury that Agent Fox had no evidence to arrest him (Tr. 704, 929, 967, 1040-41). The issue was presented to the Georgia Supreme Court on direct appeal (Supplemental Brief of Appellant to Supreme Court of Georgia, at 1-8), and the court found probable cause (Hance v. State, supra at 863-64, 268 S.E.2d at 346-47). Its decision was adopted by the state habeas corpus court (Order, Superior Court of Butts County, ¶¶ 7-8, at 2, & ¶ 2, at 12; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument I, at 1-3; Petition for Writ of Habeas Corpus, ¶¶ 7-8; Amendment to Petition for Writ of Habeas Corpus, ¶ 2, at 1) (contained in Appendices).

The Three Day Interrogation

On April 4, 1978, Agents Besson and Fox telephoned petitioner's commanding officer to say they were coming to get petitioner, who was the focus of the investigation (Habeas

Transcript at 38, 41; Tr. 678-80, 751). Petitioner was ordered to his superior's office. Petitioner had no options; he had to obey (Habeas Transcript at 26; Tr. 680, 751). Petitioner was not questioned where he was found. Instead, he was immediately taken from his unit and placed in a C.I.D. car, where he was told not to make any statements yet about the deceased women, transported to C.I.D. headquarters, and placed in an interrogation room (Habeas Transcript at 26, 38-39; Tr. 680, 751, 785-86, 992). He was not free to leave at any time thereafter (Habeas Transcript at 25, 39-41, 45; Tr. 688). His freedom to move was limited to "get[ting] up" occasionally from his interrogation chair (Tr. 782) "[j]ust for him being allowed to go to the latrine, and that was it." (Tr. 766; emphasis supplied). Both the U.S. Army Court of Military Review and the Supreme Court of Georgia found that petitioner was under arrest. United States v. Hance, supra at 624-25; Hance v. State, supra at 863-64, 268 S.E.2d at 347.

The arrest was designed to produce incriminating statements from petitioner. Agent Besson conceded that no probable cause existed when petitioner was arrested on April 4 (United States v. Hance, supra at 625 n.5), but that petitioner had become the focus of their investigation and it was hoped that interrogation might be "productive" (Habeas Transcript at 30, 38, 41). Agent Fox admitted that had the interrogation not been successful, he would have had to send petitioner back to his unit and search for more evidence specifically "to tie him into it" (Habeas Transcript at 42-43, 48-49).

The interrogation began immediately upon arrival at C.I.D. headquarters at 1:45 P.M. (Tr. 680-81, 752). Petitioner was advised of the charge of murder and was read his rights,

which he waived (Tr. 683, 782, 992). Agent Fox confronted petitioner with the fact that he had been seen with the deceased Irene Thirkield (Tr. 752). Petitioner readily admitted this fact (Tr. 783-84). The petitioner made incriminating statements during the first day of the interrogation, as both the U.S. Army Court of Military Review and the Supreme Court of Georgia found (United States v. Hance, supra at 626-27; Hance v. State, supra at 859, 268 S.E.2d at 344; Tr. 759-61, 994-95; Habeas Transcript at 29-30. But see Tr. 783-84 suggesting that the admissions were made the next day). The statements petitioner made included that the "Forces of Evil" compelled him to write the letters and make the telephone calls.

During the first day, petitioner signed forms consenting to voice and handwriting exemplars and a search of his room (Tr. 687, 722). A search conducted on April 4 of petitioner's desk turned up Army stationery, a standard item available to all service people (Tr. 843-44, 846).

The interrogation room, as Fox described, "was secured and we had a sign out 'Do Not Enter, Interview in Progress.'" (Tr. 785). During the entire interrogation, petitioner was kept isolated (Habeas Transcript at 29). The only persons allowed in during the interrogation were messengers who brought in coffees and Cokes at Fox's command (Tr. 786). The interrogation by Agents Fox and Besson on April 4 lasted from 1:45 P.M. - 10:20 P.M., and was immediately followed by an interrogation conducted by the Federal Bureau of Investigation and the Columbus Police Department which lasted from 10:20 P.M. until at least 11:20 P.M. (Tr. 680-81, 685, 687, 723, 737, 755, 787, 930-31). Petitioner was then kept under guard and allowed some sleep, but Agent Fox did not recall how much (Tr 732, 780).

According to the law enforcement agents, petitioner never demanded a lawyer throughout his questioning (Tr. 685, 692, 712, 757, 767, 987, 993-94). Fox stated that when he advised petitioner, after the confession was made and signed on the second day, that a lawyer had been retained for him, petitioner declined to talk with him. (Tr. 697, 778; Habeas Transcript at 34). Petitioner, however, insisted at trial that he asked for counsel, but that Agent Fox told him that his request could no longer be honored since he had signed a written waiver of counsel (Tr. 930, 945, 952-54, 960). The trial judge's findings of fact are ambiguous on whether petitioner asked for counsel. The court, finding the confession voluntarily made, stated, in pertinent part:

> THE COURT: I believe the only issue is on the Court to make a finding as to voluntariness . . .
>
> • • •
>
> . . . I do so find that he was properly advised of his rights. I believe by his own statement he indicated that he was advised, although he testified that he at one point wished to have an attorney. (Tr. 742-43).

Police Kept Petitioner's Lawyer Away From His Client

Meanwhile, on April 4, attorney David Clark of Columbus received a telephone call from his secretary that the afternoon newspapers of that day reported that William Henry Hance -- his client of two years standing -- had been arrested at Fort Benning and charged with murder. Attorney Clark obtained the newspaper and read the article. In light of their previous relationship, Clark felt compelled to see Hance and advise him preliminarily

(Tr. 907).*

On the afternoon of April 4, while the questioning of Hance was beginning, attorney Clark made six or eight attempts as chronicled below -- in person and by telephone -- to locate his client. Clark testified:

> . . . I tried to locate him. I looked at the article to see exactly what it said, and then called the Columbus Police Department and asked them if they had Mr. Hance there, and they told me that they didn't, that they believed he was at Fort Benning. I called the County Jail and they told me they thought he was at Fort Benning. I called the stockade at Fort Benning, they said he had been sent to Columbus, they didn't have him. They suggested I call P.M.O., Provost Marshal's Office.
>
> * * *
>
> I talked to the people at P.M.O. and they said they did have Hance, [but] that he had been sent downtown. And so, I went by the Police Department to see if they in fact did have him, and I believe I saw Russell Traino over there that evening and I asked Russell if he knew anything about it, and he said, no. I stopped into the Detective Office, and they said they didn't have him. So, I checked Fort Benning and Columbus and couldn't locate him.
>
> Q. No one admitted to you that they had him in their custody anywhere, is that right?
>
> A. That's correct.
>
> Q. And what was your purpose for trying to get in touch with him?
>
> A. I thought he at least ought to be able to talk to counsel from what the paper stated he had been charged with.
>
> (Tr. 907-09).

---

* In 1976, Clark represented Hance in a divorce action. Clark performed other services for Hance of a professional nature and Hance often came to Clark's office. In fact, two weeks prior to his arrest on April 4, petitioner visited Clark to discuss a legal matter (Tr. 907).

The State did not dispute this evidence of Clark's efforts to see petitioner. Instead, the State elicited from Clark:

> I had handled his cases in the past, and I was simply trying to make the man aware of what his rights were, and be sure that he had the opportunity for counsel. (Tr. 915).

After petitioner had signed two confessions and was brought to the County Jail, on about April 7, Clark received a signed postal card from petitioner requesting that he come to see him. Clark complied (Tr. 909, 911).

The issue of Clark's efforts to see petitioner was presented at trial, but the court ruled that the jury should decide as a matter of law whether a lawyer had a legal right to see his client undergoing interrogation (Tr. 744, 894, 907-09, 1050-51, 1064-65). The matter was again raised in a motion for a new trial, where counsel argued: "[The Columbus police and the C.I.D. agents] at least had the burden to advise him that an attorney was trying to get in touch with him." (Oct. 25 Transcript at 9). The trial court, however, reiterated that Clark's efforts to see his client undergoing interrogation and the duty of the police in such a situation was a matter for the jury (id. at 22). The issue was again presented on direct appeal to the Supreme Court of Georgia and by subsequent petition for state habeas corpus relief, but was rejected by both courts (in Supreme Court of Georgia: Hance v. State, supra at 858-59, 268 S.E.2d at 344; Brief of Appellant, at 25-28; in habeas corpus court: Order, Superior Court of Butts County, ¶¶ 11-12, at 3-4; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument III, at 6-7; Petition for Writ of Habeas Corpus, ¶¶ 11-12, at 3-4).

Petitioner's Confessions

After eighteen hours of custodial interrogation, on April 5, petitioner confessed to three murders (Tr. 723-25, 780). As the questioning progressed on the second day, petitioner began making major oral admissions, saying that the "Forces of Evil" forced him to be present at the scene of the killings (Tr. 767-68). At about 1:50 P.M., petitioner began his confession. It was typed and signed by him at 3:30 P.M. (Tr. 691, 693-96, 725, 769-70). The confession described the uncontrollable anger he felt when propositioned by prostitutes. He killed them with a quick karate chop to the head, followed by repeatedly and hysterically hitting their bodies with a jack as he wept (Tr. 772-75). Petitioner described where various items involved in the murders, including a jack, tire tool, entrenching tool, and clothing, might be found. Soldiers dispatched to the identified areas found the items (Tr. 773-77, 779, 835-36, 841-42, 848, 850, 852-53, 855-57).

On or about April 5, after the confession was made, Fox learned that petitioner's family had retained a lawyer for him (Tr. 728-29, 778). Fox believed he alerted the Columbus Police Department that a lawyer was retained for petitioner, but was not sure to whom he told that fact, but it may have been to Det. Charles Rowe (Tr. 728-29). Det. Rowe, in turn, could not recall if he was advised that a lawyer had been retained for petitioner (Tr. 716).

Fox did advise Rowe that petitioner signed a confession (Tr. 718-19). The following day, on April 6, Dets. Rowe and J.M. Day went to the C.I.D., and with Fox, questioned petitioner further (Tr. 696-97, 707-08, 712-13, 720, 791). Petitioner read and waived his rights (Tr. 708-11, 792-93). At 4:15

P.M., petitioner signed another typewritten confession, again describing the death of Gail Jackson. (Tr. 716, 794, 796-802).

On April 6, petitioner also gave a handwriting exemplar to the Columbus Police Department. It was used at trial to identify petitioner as the writer of the letters from the "Forces of Evil" (Tr. 809-10, 817-18). Petitioner was then arraigned on April 6, and charged with the murder of Gail Jackson and an attempt at criminal extortion for the demand of $10,000 in one of the letters from the "Forces of Evil" (See Tr. 825). From the fingerprints petitioner gave at arraignment, a positive match was made of one fingerprint found on the back of a page of a letter from the "Forces of Evil" (Tr. 825, 829, 832).

With No Evidentiary Hearing on Competency, Petitioner Was Permitted to Act as His Own Lead Counsel

On November 27, 1978, petitioner's motion, made against the advice of appointed counsel Richard Smith, to act as his lead counsel and handle the primary body of the trial was heard. [Transcript of Nov. 27, 1978 Hearing, at 5-6, 12 (hereinafter "Nov. Hearing")]. Richard Smith advised the court that although a State examination found that petitioner was competent to stand trial, a report of Dr. Lewis Lieberman, Ph.D., a clinical psychologist and a professor of psychology, disclosed serious doubts.

Dr. Lieberman, in his report, stated that although petitioner is "not psychotic in the usual sense . . . his thinking and emotional reactions are nevertheless clearly not normal, either." [Report of Dr. Lewis Lieberman, Ph.D., Clinical Psychologist, dated Nov. 19, 1978 (hereinafter Lieberman Report); see Order of the Superior Court of Muscogee County, Georgia

(Followill, J.) in Record on Appeal at 28-29]. Dr. Lieberman explained that petitioner suffered from a "Personality Disorder" in that "he is operating at an immature psychological level." (Lieberman Report). The report stated:

> While I have not completed all the testing I have planned, I am writing you this tentative report because my impression to date is that Mr. Hance may not be capable of assisting in an appropriate, rational way in his own defense.
>
> * * *
>
> Although it is not necessarily the case that persons with such disorders cannot help in their legal defense, in this case, it is my judgment that the problem is so severe that it does prevent him from the appropriate behavior.
>
> Mr. Hance seems to be to me extremely narcissistic and egocentric. Everything is seen only as it affects him; he seems incapable of any sort of empathy.* In addition, he is prone to daydreaming and fantasies. While (unlike the psychotic) he recognizes these fantasies as such, when they are directed towards the future, he seems incapable of estimating their probability of actually occurring. Thus, he seems to pin his hopes on his fantasies rather than realistically sizing up a situation.
>
> These tendencies manifest themselves most obviously in his expectations of his trial. He seems to view it more as an occasion for dramatic revelations than as a sober defense of his very life. I believe he wants to live, but he really doesn't seem to grasp the seriousness of his situation.

---

* Petitioner's final statement to the jury, at a hearing to determine whether the death penalty should be imposed, confirmed Dr. Lieberman's observations. When asked if he had anything to say about his position at this sentencing stage, the petitioner replied and reiterated to an astonished courtroom: "[T]his really could wreck my life and my career . . . ." (Tr. 1129, see Tr. 1149-50, 1161-62).

> His egocentrism and his fantasies prevent him from seeing his situation either from your point of view or from the point of view of prospective jurors. Without this elementary ability, how can he assist in his own defense?
>
> The characteristics of his behavior which I have been emphasizing are, of course, like those of a child and thus he is about as capable as a child would be of cooperating in a rational defense.
>
> I should also add that he himself strongly denies that he has any mental problem (as is typical of Personality Disorders) and it is very unlikely that he is malingering a Personality Disorder.
>
> (Lieberman Report, a copy of which, with the other psychological reports is contained in Appendices; emphasis supplied).

Moreover, Dr. Robert W. Wildman, the clinical psychologist who was the principal writer of the State's report finding petitioner competent to stand trial, later clarified his findings. Dr. Wildman stated that petitioner is characteristic of individuals who have

> "personality difficulties marked by long-standing feelings of inadequacy, inferiority, and insecurity. They tend not to be particularly able to think for themselves and their emotional difficulties frequently interfere with their judgment such that they often appear to lack common sense in everyday matters." (Report of Dr. Robert W. Wildman, of Central State Hospital, dated Aug. 30, 1978, authorized by Superior Court of Muscogee County in Record on Appeal at 71).

Despite these experts' reports, all inviting further study of petitioner, none was made. Petitioner, as the Lieberman report predicted, resisted further examination (Nov. Hearing at 6; Lieberman Report). Counsel then asked the court:

> [I]n view of what Mr. (sic) Lieberman has said and what they also said has been done at Central State Hospital, it seems like he is competent to make this request [and] he has requested that he be allowed to participate as [lead] counsel in this case and to handle the primary body of the proceedings. Is that correct, Mr. Hance?
>
> MR. HANCE: Yes. (Nov. Hearing at 6; emphasis supplied).

The Court then posited several questions to petitioner reminding him that he stood trial for a capital charge, that he had counsel available, and that he would be expected to abide by the court's rulings (id. at 7-12). To determine the mental competence of petitioner for self-representation, the court addressed only one question on that subject and asked it of the petitioner himself:

> THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?
>
> MR. HANCE: Right, sir.
>
> (Id. at 7).

No inquiry or evidentiary hearing was requested by counsel or ordered by the court to determine petitioner's mental competence to stand trial despite the petitioner's inexplicable, intense hatred of prostitutes and his uncontrollable rage at being propositioned by them which he expressed by killing them and beating their heads beyond recognition, all induced by the "Forces of Evil," and his writing six letters as the Chairman of the "Forces of Evil," which included among rambling and irrational thoughts his promise that unless an unrelated stocking strangler were caught, he would kill black women.

Even a cursory reading of these letters indicates that they are the product of an unstable mind producing uncontroll-

able and irrational behavior. The letters are reprinted in the Appendices at pages H-1 to H-51.

Petitioner's confessions to authorities also clearly reflect his sick mind. He expressed the uncontrollable rage he feels the moment a prostitute propositions him as if he expected the police to sympathize with his wild emotions. The confessions are reprinted in relevant part at pages I-1 to I-2 of the Appendices. Despite this record, the court made no inquiry as to petitioner's competency to stand trial and made only the most perfunctory inquiry on his application to act as his own lead counsel. At the trial itself, the defense of insanity was not raised.

Petitioner's Incompetence in Leading His Defense and His Failure to Communicate With Counsel

Although assistance of lawyer Richard Smith was provided to him, petitioner generally refused to confide information and trial tactics in his counsel (Nov. Hearing at 12). At both the suppression hearing and the trial, petitioner took the witness stand without telling Smith what he intended to say (Tr. 736, 927). At one point during the trial, petitioner handed the judge a single page letter and a multi-page letter that was not a motion. In the in-chambers conference that followed, it became clear that petitioner had not shown or discussed these notes with Smith (Tr. 599-601).

During the suppression hearing, attorney David Clark was not called to testify because petitioner did not tell Smith about Clark until the night following the hearing (Tr. 893). The next morning, the court denied Smith's motion to reopen the hearing, saying that the issue of right to counsel between peti-

tioner and Clark should be decided by the jury (Tr. 893-95; see Tr. 1050-51, 1064-65, where jury in closing arguments was asked as a matter of law to decide whether Clark had a right to see petitioner). The court, in denying the motion to reopen the hearing, expressly saddled Smith with petitioner's knowledge, although uncommunicated to him (Tr. 895).

Before closing arguments, at Smith's behest, petitioner's sworn statement was entered into the record, stating:

> I, WILLIAM HENRY HANCE, have decided of my own free will to handle the trial of my case by myself. Attorney Richard O. Smith has advised me of the dangers in being my own attorney. I have not advised Mr. Richard O. Smith nor his assistant, Walter F. Johnson, Jr. of what my defense is nor of the names or expected testimony of any of my witnesses that I intend to call.
>
> It was my feeling that I was competent to handle my own case.
>
> (Tr. 1034-35; the statement is in the Record on Appeal, at 20).

Following the sentencing of petitioner, the court informed the jury:

> Mr. Richard Smith and Mr. Walter Johnson are the Public Defenders of this County. Their services were made available by order of this Court. It's safe to tell you now, I think, that Mr. Hance himself has indicated to the Court both orally and in writing that he undertook to represent himself in this case, that he did not inform either of these attorneys what his defense was to be, nor did he tell them what witnesses he wanted subpoenaed, what he was going to ask them, these things came up moment by moment in court as far as what he has informed me and what these two attorneys have informed me.
>
> . . . I'm just trying to tell you that this situation existed. (Tr. 1193).

Petitioner presented his own opening statement. Despite the well corroborated confesssion, he promised to present an alibi defense: "I expect the evidence to show that I was in

the presence of another lady when the alleged crime took place." (Tr. 424). Two female witnesses were called to this effect, but neither could testify as to the petitioner's whereabouts on the date of February 28, 1978, when Gail Jackson was killed (Tr. 922, 924). The D.A., in his summation, emphasized to the jury that "[y]ou'll not hear a charge on alibi by the Court" because of the petitioner's failure to support such a defense (Tr. 1073-74).

Petitioner's cross-examination of Chief McClung, who testified extensively during his direct examination about the "Forces of Evil" and the letters he received, consisted of six non-probing questions, totalling one page (Tr. 456-57). Half of petitioner's cross-examination of Deborah Jones, who testified that she saw him with the prostitute Irene Thirkield consisted of the questions, "Did I ever treat you bad?" and "Did I ever treat you mean?," followed by two other meaningless questions (Tr. 612).

During the eight months preceding the trial, petitioner was in jail (Tr. 956, 961, 1041, 1053). Literally "keeping his own counsel," petitioner relied on only one law book in preparing his defense without assistance (Tr. 973, 1167; see also Tr. 20). That defense was further impaired by the fact that during petitioner's presentation, the court and jury often complained that they could not understand what he was saying or even hear him. (Tr. 485, 976, 986; see also Tr. 13, 30, 57).

In seeking state habeas corpus relief, petitioner argued that the court failed to inquire sua sponte as to his mental competence, but instead leaped to the conclusion that petitioner knowingly and intelligently elected to be his own

lead counsel (Memorandum in Support of Writ of Habeas Corpus, Argument IX, at 16; Amendment to Petition for Writ of Habeas Corpus, ¶ 4, at 1). The court rejected the argument, saying that by alerting the petitioner as to what self-representation legally entails, the trial court satisfied the obligation of Faretta v. California, 422 U.S. 806 (1975). (Order, Superior Court of Butts County, ¶ 4, at 13-15).

Ineffective Assistance of Counsel

Although not lead counsel, Attorney Richard Smith was able to raise defenses and objections the basis for which did not depend upon shared communications: he was expressly empowered by the court to raise evidentiary objections for petitioner (Tr. 20). He failed to raise basic and obvious points.

Despite evidence showing that petitioner killed prostitutes in a gruesome manner solely because they propositioned him, wrote letters in the persona of the "Forces of Evil," and suffered character disorders warranting further study, the defense lawyer failed to request an evidentiary hearing as to petitioner's competency to stand trial, his competency to be his own lead counsel or to raise the insanity defense for the jury's determination. Moreover, this defense would have cast doubt upon whether petitioner understood and voluntarily and intelligently waived his Miranda rights.

The question of jurisdiction, often denominated in the transcript as "venue," was an important issue in this case. If the land where the body was found belonged to the federal government, petitioner could have been tried only by the federal government, and if convicted, would have faced a maximum penalty

of life imprisonment -- not death.* To establish jurisdiction, the State presented James Webb, who served as the City Engineer of Columbus for one year (Tr. 493). One week prior to trial, Webb was taken by the District Attorney and the C.I.D. agent who found Jackson's body to the scene where the body was found (Tr. 494). By walking the distance without using any survey instruments, Mr. Webb testified that the body was found forty to fifty feet away from the Fort Benning federal military reservation (Tr. 494-95). The land where the body was found, according to Webb, formerly belonged to the federal government, but was deeded in April 1975, to the Board of Regents, University System of Georgia (Tr. 496-97). He produced a photostatic copy of the deed without authentication (Tr. 497-98).

The court found that a prima facie showing on venue had been made (Tr. 1038-39) and invited further evidence on the question (Tr. 498). Defense counsel failed to produce any such evidence.** This failure was critical. The court itself, in its subsequent ruling denying petitioner's motion for a new trial, observed that the issue of whether jurisdiction for the

---

* See United States v. Kaiser, 545 F.2d 467, 469 (5th Cir. 1977) (defendant sentenced to death for a murder occuring on Fort Benning, Ga. military reservation; court reversed death sentence and imposed life imprisonment, holding that capital punishment provision in 18 U.S.C. § 1111 is unconstitutional); Habeas Transcript at 2-3.

** At the habeas corpus proceeding, the indigent petitioner asked the court for funds to hire an expert witness to determine whether the land that the body was found belonged to the federal or state government. Although petitioner's counsel argued that such a request is of constitutional dimension based on the Sixth, Eighth, and Fourteenth Amendments, the court flatly rejected the request saying: "The law is clear that the State does not have to provide those things, therefore the Court will deny the motion." (Habeas Transcript at 2-5).

crime lay in the federal government or in the State of Georgia was "so close." (Oct. 25 Transcript, at 20).

Defense counsel failed to produce any requests to charge on this or on any other issue (Tr. 1033). Thus, the court's only mention of jurisdiction or venue in its charge to the jury was a cryptic reference shrouded in the following rubric:

> I charge you that if you find and believe that at any time prior to the date this indictment was returned into this Court that the defendant did, in the County of Muscogee, State of Georgia, with malice aforethought, kill and murder the person named in the indictment, Brenda Gail Faison, and the two aliases, in the way and manner set forth in this indictment, then you would be authorized to find the defendant guilty of murder. (Tr. 1095).

After the charge was given, Smith said he had assumed the court would provide a detailed charge on venue, specifically identifying it as an issue (Tr. 1102, 1104). The court denied the request, observing that a jury could not intelligently comprehend what "venue means." (Tr. 1104).*

Decisions on who would cross-examine each witness, Mr. Smith or petitioner, appear to have been made at the last minute (see Tr. 545), reflecting minimum preparation.

During the sentencing phase of the trial, Smith simply announced to the court: "Mr. Hance has advised me that he wishes to offer no evidence in mitigation except his own testimony." (Tr. 1130).

---

* As a result of counsel's failure to submit any requests to charge, the other important issues of lack of probable cause, Clark's effort to see his client during custodial interrogation, and the eighteen hour length of that interrogation, were not clearly charged by the court (see Tr. 1089-90 regarding brief definition of "voluntariness" of the confession).

The court specifically entrusted Smith to make objections on behalf of the legally untrained petitioner (Tr. 20; accord, Nov. Hearing at 9). What follows is a brief description of some of the more glaring instances where obvious objections were overlooked.

(1) At one point, the D.A. asked a witness:

> Q. Did you know that on September 3, 1968, he was indicted or charged or arrested in Lexington, Virginia, in that on the 15th day of July, 1968, he did unlawfully and feloniously and maliciously strike and wound a Shirley Humphrey with an iron pipe with intent to maim, disable, disfigure or kill the said Shirley Humphrey?
>
> A. No. (Tr. 926).

No objection was raised to the improper mention of an arrest in another jurisdiction that was also over ten years old. The question was particularly prejudicial because the petitioner in the instant case was accused of similarly using a metal instrument to kill Gail Jackson. The petitioner was thus forced to explain this 1968 arrest in his closing argument (Tr. 1041). When arguing for the imposition of the death penalty, the D.A. emphasized this prior arrest to the jury (Tr. 1144), although the court warned that only prior convictions could be introduced at the sentencing hearing (Tr. 1119). There, too, defense counsel failed to object.

(2) Many photographs of the battered prostitutes' bodies were admitted into evidence (Tr. 520, 673, 873-74, 876-77, 879-80; State's Exhs. 7-17, 29, 34, 35, 37, contained in Vol. VI of the Trial Transcript). A few of the more gruesome pictures were excluded when counsel objected. However, the D.A. was able to introduce actual corpse fragments, without any defense objection whatsoever (Tr. 538, 875). Living up to his

promise in his opening statement to present the crime in "vivid detail" (Tr. 411), the D.A. presented pieces of Gail Jackson's upper and lower jawbone with four teeth attached to each part, individual teeth, and bone fragments (Tr. 535, 538). In his closing argument, the D.A. referred to the "pieces of jawbone with teeth attached, fragments of human skull no larger than a dime, individual teeth, and you'll have that with you to take out in evidence." (Tr. 1070).

In the rulings on the admissibility of the State's various exhibits, Smith often asked petitioner if he had any objection to their admissibility (see Tr. 869, 871-72, 878, 887). Regarding the photographs, for example, Smith asked petitioner, "Do you object?" Petitioner stated, "I guess not." (Tr. 871).

(3) When petitioner testified in his own defense, the D.A. was allowed to ask him, without objection, whether he had made admissions to the doctors at the Central State Hospital (Tr. 980-81). The D.A. later called one of the examining doctors, Dr. Carl L. Smith, and asked him:

> Doctor, did you have an occasion to discuss with the defendant the offense that he is charged with here today and any other offense, and another offense? (Tr. 1014).

Defense counsel failed to object to this improper and prejudicial question and stood by silently while the court and the D.A. debated the merits of the physician-patient privilege (See Tr. 1014-15). Only after this colloquy did Smith turn to petitioner to ask whether he intended to invoke the privilege (Tr. 1015). When the court told Dr. Smith to retire from the stand outside the jury's presence, defense counsel failed to ask that a cau-

tionary instruction be given to the jury to disregard the doctor's entire testimony and especially the last offensive question. (Tr. 1026-27).

(4) When prospective juror Brenda Owens indicated that she might be prejudiced against petitioner because of his race, and she would be further biased towards the State because she attends the same church as State's witness Chief McClung and respects him, defense counsel did not move that she be excused for cause (Tr. 296-98).

(5) The prosecutor improperly shifted the burden of proof in his argument to the jury. In his opening he said that petitioner can "present any and all evidence which it has in defense of the charges" (Tr. 419). In closing, he asked why petitioner did not bring in "his preacher, his commanding officer, his fellow soldiers, his first sergeant, to testify as to his good character?" instead of the "woman that has born his illegitimate child." (Tr. 1074). No objections were raised.

(6) On cross-examination of petitioner, the prosecutor improperly forced petitioner to characterize the State's witnesses as liars (regarding Agent Fox - Tr. 966-67, 980; regarding Det. Rowe - Tr. 969, 971-72, 978; regarding Sinnie Burrell, the police stenographer - Tr. 1032). Using the characterizations, the D.A. in his summation emphasized that credibility was the critical issue in the trial (Tr. 1064, 1067, 1075) and told the jurors that petitioner was calling each of the State's witnesses "in effect, a perjurer" (Tr. 1067). Improperly bolstering his case and the veracity of the State's witnesses, the prosecutor then continued that the testimony of the State's witnesses had "the ring of truth about it" (Tr. 1067, 1076). No objections were raised to any of these instances of misconduct.

(7) The District Attorney's summations in this case was a compendium of reversible error. But defense counsel did not object. Citing his three years with the Federal Bureau of Investigation, his eight years as a prosecutor, and his community roots, the prosecutor vouched for the strength of his case and for the appropriateness of imposing the death penalty upon petitioner (Tr. 1054, 1061, 1137; see also Tr. 399-400 where D.A. cited the five and one-half years of service of his trial assistant district attorney). Referring again to "my years in law enforcement and in prosecution" (Tr. 1061), the D.A. became an unsworn witness for the State when he explained why people generally confess (id.: "So I say to you it's more of a natural process than it is an unnatural process."). The presentation of his credentials in law enforcement also added great authority when the D.A. asserted to the jury that attorney Clark had no legal right to see petitioner while he was in custody (Tr. 1065). Regarding the confession, the D.A. said "that was the 'clincher'." (Tr. 1066). No objections were raised.

The D.A. stated that petitioner, using the label of the "Forces of Evil" "snuffed out" his victim's life (Tr. 1055-56), and "prey[ed] on the fears of our community in perhaps what has been its most troubled time." (Tr. 1062-63). The D.A. stated:

> Thank God for them [the C.I.D.], I might add, and for the Columbus Police Department, too. I'll sleep better tonight and I feel that each of you will too, because of the work they did in this case as well as the fact that they are out there in other cases. (Tr. 1062).

Although noting in his summation on petitioner's guilt that the key issue is guilt or innocence, the D.A. improperly

anticipated the second sentencing phase of the trial. [Compare Tr. 1056-57 (during guilt summation: "Now specifically on the count of murder, if you do in fact, and I trust that you will because the evidence has absolutely been overwhelming, I think you all realize that . . . there will then be a second period at which time the State may introduce evidence by way of aggravation . . . ") with Tr. 1132 (during sentencing summation: "I had the advantage of knowing what the strength of the State's case was. I had the advantage of sincerely and objectively knowing the evidence, believing that we would be at this stage of the trial at some point this week.")]. No objections were taken on petitioner's behalf. Reflecting on the improper bolstering, the D.A. in his summations on guilt and sentencing used the pronoun "I" over 300 times (see Tr. 1054-77, 1131-63).

No objection was taken to the prejudicially improper remarks by the D.A. in his argument during the penalty phase of the trial. He flattered the jury, saying that when he evaluated each of its members during the voir dire he looked for courage (Tr. 1159). His chest "swelled with pride" when he heard them say at voir dire that all human life is sacred, even that of a prostitute. "I wish you could have heard [your answer] collectively." (Tr. 1141-42). On this point, he cited to his own soul searching and decision-making in recommending the death penalty (id.). While knowing the actual circumstances of petitioner's self-representation, the D.A. asserted that petitioner's act of representing himself was a standard defense tactic in death penalty cases, done to personalize him to the jury thus making it more difficult for them to vote a sentence of death (Tr. 1139-41). Of course, the D.A. was not attributing "this ploy or what have you to Mr. Smith and Mr. Johnson." (Tr. 1140). No objections were taken.

Life imprisonment would not be an acceptable alternative to death because the petitioner might escape, speculated the D.A., as he named specific local penitentiaries (Tr. 1157). In emotionally charged language, the D.A. posited that, if he received only a life sentence, the petitioner would kill prison guards and corrupt younger inmates who may be serving time only for "joy-riding" (Tr. 1157-58). "What about those prison guards that have to guard him? What about their wives and families . . . what about them, what about their families? You're going to subject those people to him for the next fifty years of his life?" (id.). No objections were raised.

The D.A. then asked the jury to unleash upon this petitioner all their anger in a "War Against Crime":

> How many times have you said to yourself as you pick up your morning newspaper or turn on your radio or television newscast, has the whole world gone crazy, when you read about a crime like this, has the whole world lost its mind? When have you said to yourself, is there an end to this somewhere, somehow? When have you said to yourself, what can I do, just one citizen, just one individual, to stop this? How many times have you said that to yourself? I've said it to myself, Lord knows how many. How many times have you said, why doesn't somebody do something?
>
> Well, it's time for somebody to do something. It's time for each and every one of you to do something. It's time for each and every one of you to act on the remarks that you've made similar to the ones that I've recounted here. It's your time. You're in the batter's box, so to speak, I don't want to make sports analogies, maybe I shouldn't say that, but it's a matter now of fish or cut bait, because we're right down to it, we're right down to it. (Tr. 1158-59).

Just as this nation was involved in World War II, the Korean War, and the Vietnam War, the D.A. continued, when "we've said,

this person is the enemy, they are trying to destroy our way of life, when you see this person, kill him," the jury is now faced with a similar enemy in a war "just as real, perhaps closer to home than any of those. It's a war against crime." (Tr. 1160). No objection was made to any of these remarks, and no objection was filed when the D.A. stated:

> I'm going to sleep well tonight, having made the recommendation to you. As a matter of fact, I'm going to sleep better and safer in my home with my family if you come back with a sentence of death. (Tr. 1155).

After forty-two minutes of deliberation, the jury returned with the death sentence. (Tr. 1181-83).

The Court's Erroneous Charge on Intent

On the element of intent, the court charged the jury that the law presumes the petitioner to be of sound mind and discretion; the acts of a person of sound mind and discretion are presumed to be the product of that person's will; and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions, the court charged, may be rebutted. The court then instructed the jury that they could either deliberate on intent or instead expediently opt to use the presumption authorized by law, a charge which this Court has condemned [Sandstrom v. Montana, 442 U.S. 510 (1979); Tr. 1093-94, reprinted in Appendices].

Immediately after this charge, the court instructed the jury that, under Georgia law, the element of malice aforethought "shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." [Tr. 1094-95; quoting Ga. Code

§ 26-1101 (emphasis supplied); see Mullaney v. Wilber, 421 U.S. 682, 686 (1975) (similar charge struck as violative of Due Process)]. The entire charge contained only one brief reference to the presumption of innocence (Tr. 1083). No objections were made on petitioner's behalf.

The Supreme Court of Georgia observed that petitioner was effectively represented at trial (Hance v. State, supra at 865, 268 S.E.2d at 347). The issue of ineffectiveness of counsel was raised in and rejected by the state habeas corpus court (Order, Superior Court of Butts County, ¶¶ 29-30, at 9, & ¶ 1, at 10-12; Memorandum in Support of Writ of Habeas Corpus, Argument II, at 4-5; Petition for Writ of Habeas Corpus, ¶¶ 29-30, at 10-11; Amendment to Petition for Writ of Habeas Corpus, ¶ 1, at 1).*

---

* The substantive omissions underlying the claim of counsel's ineffectiveness were also independently raised and preserved in the courts below (See, e.g., failure to contest jurisdiction and venue: Hance v. State, supra at 858, 268 S.E.2d at 343-44; Order, Superior Court of Butts County, ¶¶ 23-24, at 7; Petition for Writ of Habeas Corpus, ¶¶ 23-24, at 8-9; Oct. 25 Transcript at 9-11, 20-21; trial court's patently erroneous charges on intent: Order, Superior Court of Butts County, ¶¶ 21-22, at 5-7; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument V, at 9-10; Petition for Writ of Habeas Corpus, ¶¶ 21-22, at 7-8; introduction of actual corpse fragments -- Order, Superior Court of Butts County, ¶¶ 15-16, at 5, Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument IV, at 8; Petition for Writ of Habeas Corpus, ¶¶ 15-16, at 5-6; inflammatory, prejudicial argument by prosecutor: Order, Superior Court of Butts County, ¶¶ 27-28 at 8-9; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument VI, at 11-12; Petition for Writ of Habeas Corpus, ¶¶ 27-28 at 9-10; use at trial of an over ten year old arrest in another jurisdiction on similar facts -- Hance v. State, supra at 865-66; 268 S.E.2d at 348; Order, Superior Court of Butts County, ¶¶ 17-18, at 5; Petition for Writ of Habeas Corpus, ¶¶ 17-18, at 6-7; failure to call witnesses at death penalty hearing -- Order, Superior Court of Butts County, ¶¶ 29-30, at 9; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument II, at 4; Petition for Writ of Habeas Corpus, ¶¶ 29-30, at 10-11; Amendment to Petition for Writ of Habeas Corpus, ¶ 1, at 1; see Habeas Transcript at 3-5, where court ruled that indigent petitioner was not entitled to payment of expenses for witnesses to testify in mitigation of death penalty).

The Court Barred Any Evidence of Petitioner's Mental State Offered in Mitigation at Death Penalty Hearing

During the sentencing phase of the trial, after a verdict of guilt was returned, defense counsel attempted to present in mitigation the petitioner's mental state at the time of the commission of the crime and at trial so that the sentence-imposing jury could "understand what goes into his mind and what kind of person he is." (Tr. 1125). The court sustained the D.A.'s objection and barred this line of inquiry entirely.

Counsel began: "You told us just yesterday that you didn't kill these girls." Petitioner responded: "I didn't." (Tr. 1124). When the District Attorney objected, Smith explained:

> MR. R. SMITH: Your Honor, my position, of course, at this hearing is that the question of whether or not he killed the girls has been decided by the jury, and I'm not asking that question for purposes of trying to raise the question in the juror's minds at this point. But, I think it's significant to get into his thoughts and thought processes on the question in terms of mitigation for the jury to understand what goes into his mind and what kind of person he is. (Tr. 1125).

Counsel then continued the questioning of petitioner (Tr. 1126-27), but the D.A. then again objected to any introduction of petitioner's state of mind:

> MR. W. SMITH [DISTRICT ATTORNEY]: Your Honor, this is trying to imply some kind of mental issue in the trial which has not been raised by any competent evidence whatsoever during the course of the trial, not been in issue at this trial.
>
> MR. R. SMITH: Your Honor, the defendant's state of mind at the time of the trial and the time of the commission of the crime, all those things are to be considered in this stage of the trial.

> THE COURT: I believe the District Attorney's point is well taken. I'll overrule, I'll sustain his objection and direct you not to follow along the line of questioning that you have just outlined. (Tr. 1127-28).

The jury returned a sentence of death (Tr. 1181-83), and the court ordered that petitioner be electrocuted in conformity with such recommendation (Tr. 1190-91).

The issue of the patently erroneous order of the trial court barring any evidence of defendant's mental state at either the time of the homicides or during the trial was raised and preserved in the courts below (Tr. 1124-28; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument VII, at 13; Petition for Writ of Habeas Corpus, ¶¶ 25-26, at 9). On habeas corpus review, the state court upheld the exclusion of such evidence saying that it "was irrelevant in the sentencing phase . . ." (Order, Superior Court of Butts County, ¶¶ 25-26, at 8).

ARGUMENT

POINT I

WHERE THE GEORGIA COURTS AND U.S. MILITARY COURTS HAVE REACHED CONTRARY CONCLUSIONS ON THE SAME FACTS AS TO THE LEGALITY OF PETITIONER'S ARREST AND WHETHER HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS WERE VIOLATED, THIS COURT SHOULD RESOLVE THE CONFLICT

Two courts reviewing the identical facts reached different conclusions on the legality of petitioner's arrest and the admissibility of the confession and other evidence that directly resulted from the arrest. A unanimous U.S. Army Court of Military Review held that the arrest was not based on probable cause, that the taint of the illegality was not dissipated, and that the confessions and other evidence discovered as a result

thereof must be excluded.* United States v. Hance, 10 M.J. 622 (1980). The Supreme Court of Georgia and a Georgia Superior Court hearing a writ of habeas corpus found probable cause. Unless this Court resolves this conflict now, petitioner may be foreclosed from ever again raising the Fourth Amendment issue. See Stone v. Powell, 428 U.S. 465 (1975).

In finding probable cause, the Georgia courts have departed from the rules set down by this Court. See Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975). Moreover, in this case this Court may clarify the Fourth Amendment's application to a prolonged custodial interrogation.

The Fourth Amendment dictates that an arrest must be predicated on probable cause. Brown v. Illinois, supra. Probable cause exists when a person of reasonable caution would be justified in believing that the individual to be arrested has committed a crime. See Wong Sun v. United States, 371 U.S. 471, 479 (1963). Probable cause is necessary when police restrain an individual in a manner that is so intrusive as to be "tantamount" to an arrest. Dunaway v. New York, supra at 212-16.

From the circumstances surrounding the telephone calls and the letters from the "Forces of Evil," C.I.D. agents believed that the perpetrator in the present case was a black male soldier.

---

* The federal military appellate court remanded the case for a rehearing on probable cause in light of the Government's belated allegation that, immediately prior to his arrest, petitioner's voice had been identified from a tape-recorded telephone conversation. This identification, however, turned out to be a hearsay description of an uncertain comment by two of petitioner's military superiors that they "felt" it was petitioner's voice, but could not say so with certainty, and the military decided not to proceed further with the prosecution. Moreover, this additional evidence was not credited by the state habeas corpus court which chose instead to rely on the prior assessment of probable cause made by the Supreme Court of Georgia without the voice identification. See Statement of the Case at pages 6 - 9, supra.

Agent Fox also received information from "a girl named 'Peaches'" that petitioner, a black male soldier, had given Irene Thirkield, one of the deceased prostitutes, a ride to a local bar (Tr. 697-98, 727-28). On this information, the Supreme Court of Georgia held that probable cause existed to arrest petitioner for murder. Hance v. State, 245 Ga. 856, 864, 268 S.E.2d 339, 347 (1980).

This decision is not tenable. The fact that a soldier is seen with a woman at a local bar near a military reservation hardly amounts to probable cause.

In addition, the State may now belatedly contend that the fact that petitioner's commanding officer and first sergeant made a tentative identification of petitioner's voice from a tape-recording of a telephone call supports a determination of probable cause. But of the two arresting officers, Agent Fox admitted that he knew nothing about the tape-recording or the identification before he arrested petitioner (Habeas Transcript at 46-47, 51). The other officer, Agent Besson, knew about the uncertain identification of a telephone recording but testified that he did not believe there was probable cause to arrest the petitioner when he and Agent Fox did so on April 4 (United States v. Hance, 10 M.J. at 625 n.5).

Concerned by the flimsy evidence used to arrest petitioner, the state habeas corpus court stated: "Well, I didn't understand why you and Mr. Fox thought Mr. Hance had anything to do with it" (Habeas Transcript at 23; accord, id. at 43-44). The court made no findings as to the additional proffer of the uncertain telephone recording identification; it simply cited the Georgia Supreme Court's prior opinion and found that the arrest was based on probable cause because of Peaches's information, and the fact that petitioner had been given the warnings

required by Miranda v. Arizona, 384 U.S. 436 (1966). Order, Superior Court of Butts County, entered July 29, 1981, ¶¶ 7-8, at 2, & ¶ 2, at 12 (contained in Appendices). Following this order, the Georgia Supreme Court issued a certificate denying review of the dismissal of the habeas corpus petition.

The arrest was designed to produce incriminating statements, as in Dunaway and Brown. The agents testified that "we decided to talk to him" because petitioner had become the focus of their investigation and such talks might be "productive" (Habeas Transcript at 24, 30, 38, 41). Agent Fox admitted that had the interrogation not been successful, he would have had to send petitioner back to his unit and to search for more evidence specifically "to tie him into it." (Id. at 42-43, 48-49).

The other circumstances indicate petitioner's arrest was made in a manner purposefully calculated and effected "to cause surprise, fright, and confusion." Brown, 422 U.S. at 605. The agents telephoned petitioner's commanding officer to say they were coming to get petitioner (Tr. 678-80, 751). Petitioner was ordered to his superior's office. Petitioner had no options; he had to obey (Habeas Transcript at 26; Tr. 680, 751). Petitioner was not questioned briefly where he was found. Instead, he was taken from his unit and placed in a C.I.D. car, where he was told not to make any statements yet about the deceased women, transported to C.I.D. headquarters, and placed in an isolated interrogation room (Habeas Transcript at 26, 38-39; Tr. 680, 751, 785-86, 992). He was not free to leave at any time thereafter (Habeas Transcript at 25, 39-41, 45; Tr. 688). His freedom to move was limited to "get[ting] up" occasionally from his interrogation chair (Tr. 782) "[j]ust for him being allowed to go to the latrine, and that was it." (Tr. 766; emphasis supplied).

See Dunaway v. New York, supra at 212. Both the U.S. Army Court of Military Review and the Supreme Court of Georgia found that petitioner was under arrest. United States v. Hance, supra at 624-25; Hance v. State, supra at 863-64, 268 S.E.2d at 347.*

There remains the question of whether the connection between this unconstitutional police conduct and the evidence discovered as a result thereof obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit its use at trial. See Rawlings v. Kentucky, 448 U.S. 98, 106-07 (1980); Dunaway v. New York, supra at 216; Wong Sun v. United States, supra at 487-88; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

In determining whether a confession is obtained by the exploitation of an illegal arrest, this Court has identified several factors to be considered: the Miranda warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. "And the burden of showing admissibility rests, of course, on the prosecution." Brown v. Illinois, supra at 603-04; accord, Rawlings v. Kentucky, supra; Dunaway v. New York, supra at 218.

---

* In the appellate proceedings of both the state and federal military trials, the retroactivity of Dunaway v. New York, supra, was raised. The Georgia Supreme Court did not comment on the question, and the U.S. Army Court of Military Review stated that the issue is not present in this case because "[t]he basic principles announced in Wong Sun and Brown remain unchanged in Dunaway and are controlling here." United States v. Hance, supra at 627 n.12. At least one federal court and one state court of last resort have disagreed on Dunaway's retroactivity. Compare United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979) (Dunaway should be applied retroactively) with State v. Deputy, 433 A.2d 1040 (Del. 1981).

The State's proof on the Miranda warnings was limited solely to testimony that, when petitioner was advised of those rights prior to his statements and asked whether he understood and wished to waive them, he responded affirmatively. But petitioner's mental condition, as described herein, casts grave doubt upon whether petitioner could validly waive his Miranda rights. The trial court should have considered whether petitioner's mental condition "may have deprived him of his freedom of choice, the essence of his ability to make a voluntary confession." Eisen v. Picard, 452 F.2d 860, 863-64 (1st Cir. 1971), cert. denied, 406 U.S. 950 (1972); accord, Blackburn v. Alabama, 361 U.S. 199 (1960).

At any rate, Brown v. Illinois, supra at 601, settled that "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth," and held therefore that "Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation." Accord, Dunaway v. New York, supra at 216-17. "Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." Brown v. Illinois, supra at 601-02; accord, Dunaway v. New York, supra at 217.

The factor of temporal proximity contemplates that the passage of time between the arrest and the confession may diminish the probability that the confession is tainted. In the instant case, the petitioner made some incriminating statements on the first day but did not confess until the second day after prolonged interrogation. On the question of the proximity of the confession, the federal military appellate court reasoned:

> Moreover, a significant passage of time, depending on the circumstances, can increase rather than diminish the likelihood of a tainted confession. As Justice Stevens noted in his concurring opinion in Dunaway v. New York, 442 U.S. at 220:
>
> > The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest rather than a short one.
>
> In this case the apprehension was exploited in that the interrogation was prolonged and the appellant was not free to leave. Indeed, he was confined to bachelor enlisted quarters for two nights.

United States v. Hance, supra at 627.

The purpose and flagrancy of the police action is another significant factor. First, the arrest here was investigatory in nature, a significant consideration in Brown. 422 U.S. at 605. Second, the manner of the arrest was calculated to provoke "surprise, fright, and confusion," another important factor in Brown. Id. Finally, petitioner was not free to go, was not told that his attorney had inquired about him, and the police deliberately misinformed petitioner's lawyer as to his client's whereabouts.

The U.S. Army Court of Military Review correctly concluded:

> In the instant case, there were no significant intervening circumstances which would attenuate the taint. To the contrary, as noted, the taint was exploited by the prolonged interrogation and the irregular confinement of appellant.
>
> The Government has failed to establish the legality of the appellant's apprehension and has not demonstrated that this taint was dissipated. The resulting confessions and other derivative evidence therefore were inadmissible.

United States v. Hance, supra at 627 (footnote reference omitted).

Petitioner respectfully requests that this Court grant a writ of certiorari to examine the conflict between the federal and state appellate courts on whether this death-sentenced petitioner's Fourth Amendment rights were violated. The state court's determination of petitioner's federal rights conflicts squarely with this Court's applicable decisions. This case also presents the effect of a prolonged interrogation in exacting confessions when the arrest was not based on probable cause.

POINT II

A CONFESSION TAKEN FROM A DEFENDANT WHO IS NOT TOLD BY LAW ENFORCEMENT OFFICIALS BEFORE CONFESSING THAT HIS LAWYER TRIED TO SEE HIM BUT WAS UNSUCCESSFUL BECAUSE THEY LIED TO HIS ATTORNEY SHOULD BE EXCLUDED PURSUANT TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

Where an attorney repeatedly attempts to communicate with his client who is being interrogated, and where law enforcement officials lie to the attorney and do not inform the accused of his lawyer's inquiries, should an ensuing confession be suppressed? This is a constitutional issue which this Court has never resolved. State courts are in conflict as to the constitutional requirements in such cases.

In Escobedo v. Illinois, 378 U.S. 478 (1964), this Court announced that a "'confession taken from a defendant, during a period of detention [prior to indictment], after his attorney had requested and been denied access to him' could not be used against him in a criminal trial." Id. at 486-87 (brackets in original), quoting with approval People v. Donovan, 13 N.Y.2d 148, 151, 243 N.Y.S.2d 841, 842, 193 N.E.2d 628, 629 (1963). In the facts of Escobedo, however, while the attorney was asking to see his client, the client was at the same time

asking to see his attorney.

State courts do not agree as to what is required of police officials when a lawyer demands to see his client, but the client undergoing custodial interrogation has waived his Miranda rights. The Supreme Court of Louisiana, for example, in State v. Jackson, 303 So.2d 734 (1974), stated that governmental authorities cannot deny a retained lawyer reasonable access to his client. Id. at 737. A waiver of the right to the assistance of counsel and to remain silent is never informed, the court stated, unless the officials advise the accused that a lawyer had called for him, had stated that he had been retained to represent him, and had asked that he not be interrogated until the lawyer could confer with him. Id. The Supreme Court of Nebraska and the Supreme Judicial Court of Massachusetts agree. State v. Johns, 185 Neb. 590, 177 N.W.2d 580 (1970); Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969). In McKenna, the court held that Escobedo requires that when an attorney identifies himself to police and states that he wants to be with his client, the police have the immediate duty to so inform the accused. 355 Mass. at 324, 244 N.E.2d at 566. An individual undergoing custodial interrogation is "entitled to know of his counsel's availability and, with that knowledge, to make the choice [to go on with the interrogation] with intelligence and understanding." Id. Absent that knowledge, any waiver that may have been made "became then inoperative." Id.

In direct conflict, the Supreme Court of Pennsylvania has held that police have no obligation to inform an accused of his lawyer's availability, and that an ensuing confession is admissible even though police lied to the lawyer. Commonwealth v. Yates, 467 Pa. 362, 357 A.2d 134 (1976). In the present

case, the Supreme Court of Georgia and the Georgia Superior Court also found no constitutional violation. See Statement of the Case at page 14, supra. To resolve this conflict and to settle this question, petitioner respectfully requests that this Court grant a writ of certiorari.

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court stated that the Constitution demands adherence to a higher standard than was applied in the present case:

> "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) (Fuld, J.)." 384 U.S. at 465 n.35.

There is further substantial support for a rule requiring the police to allow counsel prompt access to his client upon request. The American Law Institute's Model Penal Code of Pre-Arraignment Procedure § 140.7 (1975) provides:

> An attorney undertaking to act as counsel for an arrested person shall have prompt access to such person, by telephone, and in person on counsel's arrival at any place where such person is detained. . . .

Here, the evidence is uncontroverted. The police gave petitioner's counsel false information in order to delay or frustrate petitioner's access to counsel. Petitioner was kept incommunicado for a three day period [see Darwin v. Connecticut, 391 U.S. 346, 349 (1968)] and interrogated constantly by relays of police officers [see Harris v. South Carolina, 338 U.S. 68, 69-70

(1948)] until he confessed (Tr. 680-81, 685, 687, 723, 732, 737, 755, 780, 785, 787, 930-31; Habeas Transcript at 29). The interrogation room "was secured and we had a sign out 'Do Not Enter, Interview in Progress.'" (Tr. 785). As this Court observed in Escobedo, once a confession is extracted, the trial becomes no more than an appeal from the interrogation, and a defendant's right to counsel becomes a mere formality. Escobedo v. Illinois, supra at 487-88.

Moreover, the State must establish by a preponderance of the evidence that petitioner's waiver of his right to counsel was voluntary, knowing, and intelligent. See Lego v. Twomey, 404 U.S. 477, 489 (1972); Miranda v. Arizona, supra at 444 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The only evidence of such a waiver in this record are the one word answers given by petitioner while restrained in the interrogation room. When petitioner's attorney was denied access to him, and petitioner was not informed of his attorney's availability, "one word answers are insufficient to establish a valid waiver." Commonwealth v. Yates, supra at 370, 357 A.2d at 138 (dissenting opinion).

To determine whether a confession obtained by these police tactics should be suppressed, petitioner respectfully requests this Court to grant a writ of certiorari.

POINT III

DESPITE STRONG EVIDENCE OF MENTAL IMBALANCE, THE COURT FAILED TO INQUIRE AS TO PETITIONER'S COMPETENCE TO STAND TRIAL, OR TO QUESTION HIS DEMAND TO BE HIS OWN LEAD COUNSEL, ALL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

In Pate v. Robinson, 383 U.S. 375 (1966), this Court held that when there is evidence raising a bona fide doubt as to the defendant's competence to stand trial, the accused is

constitutionally entitled to a hearing on the issue of his capacity to proceed. Even if the parties fail to bring the issue to the court's attention by appropriate motion, the court is obligated to act sua sponte. 383 U.S. at 385. However, as one perplexed Court of Appeals observed this year: "The Supreme Court has not attempted to promulgate a standard describing the quantum of doubt that must exist before a trial judge is required to hold a Pate hearing." Acosta v. Turner, 666 F.2d 949, 954 (5th Cir. 1982).

This case presents the Court with an opportunity to address the issue of what quantum of doubt must exist before a trial judge is required to hold a Pate hearing. The Court of Appeals for the Fifth Circuit, surveying its own decisions on the applicable standard, found them to be inconsistent. Acosta v. Turner, supra at 954 (standards for level of doubt range from "substantial" to "real, substantial, and legitimate doubt" to evidence sufficient to "clearly and unequivocally create reasonable doubt") (citing cases). In sum, "no single phrase has yet evolved that captures all the nuances of Pate . . ." Id.

The Ninth Circuit has recently confessed that it is troubled by the question of whether a defendant whose competence is in question may make certain kinds of decisions, but not others. Chavez v. United States, 656 F.2d 512, 518-19 (1981).

Pate declared that federal constitutional law, rather than state law, governs a defendant's right to a hearing on his competence to stand trial. The import of Pate is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required on the issue of fitness to proceed. Drope v. Missouri, 420 U.S.

162, 180 (1975). See also Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam). In the present case, the court failed to conduct any inquiry at all on defendant's mental competence to proceed. The issues presented here then are whether the Georgia courts failed to apply the law as prescribed in Pate and Drope and whether there were facts and evidence present that raised a bona fide doubt as to petitioner's competence, entitling him to a hearing.

This is not a case where the trial judge was asked to be a psychiatrist. Three weeks before the trial, substantial evidence suggested petitioner's mental incompetence. The letters from the "Forces of Evil" were replete with ravings, petitioner's incriminating statements leading to a confession further recited that the "Forces of Evil" propelled him to kill prostitutes, and the gruesome manner in which the prostitutes were slaughtered reveals a wholly abnormal, depraved mind. In addition, the court was informed that a clinical psychologist's report plainly stated that petitioner's character disorders deserved further study to determine competency (Nov. Hearing at 5-6).* Ignoring all these facts, the trial judge failed to make any inquiry on petitioner's mental fitness to stand trial.

At the same hearing, petitioner stated that he would not share any trial tactics or information with defense counsel

---

* In denying habeas corpus relief, the Superior Court of Butts County stated that petitioner was examined by a psychologist "pursuant to the granting of counsel's motion [who] found petitioner competent." Order, Superior Court of Butts County, supra at 11. This statement by the habeas court is simply wrong. The defense psychologist report clearly stated:

> ". . . my impression to date is that Mr. Hance may not be capable of assisting in an appropriate, rational way in his own defense." Lieberman Report.

(Nov. Hearing at 12). Still, the court failed to make any inquiry on the petitioner's competence.

Wholly apart from its failure to hold a hearing on petitioner's competency to proceed, the court erred in not conducting a meaningful inquiry on petitioner's decision to act as his own lead counsel. In Westbrook v. Arizona, 384 U.S. 150, 150 (1966) (per curiam), this Court stated:

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465; Carnley v. Cochran, 369 U.S. 506.

In the present case, the Court conducted a simple pro forma colloquy with the accused about his demand for self-representation (Nov. Hearing at 7-12). But in Pate, whose intervening decision was the basis for the remand in Westbrook, 384 U.S. at 151, this Court plainly held that a trial court may not dispense with an evidentiary hearing simply because a defendant displays mental alertness and understanding in "colloquies" with the trial judge. Pate v. Robinson, supra at 385.*

---

* The court here addressed only one question on mental competence and asked it of the petitioner himself:

(Footnote continued on page 49)

Moreover, although the state's psychologist concluded that petitioner was competent to stand trial, it gave no opinion regarding his competency to represent himself. Indeed, he stated that individuals with petitioner's "personality difficulties . . . tend not to be particularly able to think for themselves, and their emotional difficulties frequently interfere with their judgment such that they often appear to lack common sense in everyday matters." (Report of Dr. Robert W. Wildman, quoted in Statement of the Case, at page 18, supra). The trial court failed to fulfill its "protecting duty," under Johnson v. Zerbst, supra, and Westbrook v. Arizona, supra at 150-51, by not inquiring further as to petitioner's mental competence to elect to be his own lead counsel.*

The state habeas corpus court held that counsel was not ineffective in not moving for an evaluation to determine com-

---

(Footnote continued from page 48)

THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?

MR. HANCE: Right, sir. (Nov. Hearing at 7).

* Dr. Lieberman's forecast of the trial (Statement of the Case, at pages 16-18, supra) was absolutely accurate. As predicted, petitioner denied having any mental problems (Nov. Hearing at 7), lived up fully to his avowed intention not to share confidences with his trial counsel (Nov. Hearing at 12; Tr. 599-601, 736, 893-95, 927, 1034-35, 1193; Oct. 25 Transcript at 3; Record on Appeal at 20), conceived of the trial as an occasion for dramatic revelations by announcing a surprise alibi defense which was totally unsupported (Tr. 424), and viewed everything with extreme narcissism and egocentrism (Tr. 1129; see Tr. 1149-50, 1161-62). At the hearing to determine whether the death penalty should be imposed, when asked if he had any comment to make to the jury at this sentencing stage, petitioner replied and reiterated: "[T]his really could wreck my life and my career . . . ." (Tr. 1129, see Tr. 1149-50, 1161-62).

petency, and that the trial court adequately complied with the procedure set out in Faretta v. California, 422 U.S. 806 (1975), before granting petitioner's demand for self-representation. Order, Superior Court of Butts County, ¶ 1, at 10-11, & ¶ 4, at 13-15, addressing Memorandum in Support of Writ of Habeas Corpus, at 9, and Amendment to Petition for Writ of Habeas Corpus, ¶¶ 1 & 4. Petitioner respectfully requests this Court to grant a writ of certiorari to review the constitutional questions involving mental competence in this capital case and to review the application of this Court's decisions by the Georgia courts.

POINT IV

IN A CAPITAL CASE, PETITIONER WAS GIVEN THE HELP OF COUNSEL WHOSE LEVEL OF PERFORMANCE FELL CRITICALLY BELOW EFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

Fifty years ago this Court ruled that the right to be heard by counsel is fundamental to a fair trial. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). This right means more than simply counsel's presence -- a person accused of a crime is entitled to the "effective assistance of counsel." See, e.g., McMann v. Richardson, 397 U.S. 759, 771 (1970) ("defendants facing felony charges are entitled to the effective assistance of competent counsel"); Anders v. California, 386 U.S. 738, 744 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

This Court, however, has never expounded upon the minimum level of competence necessary to satisfy the requirement of the Sixth Amendment. In the absence of a standard fixed by this Court on this "question of fundamental importance to the administration of criminal justice in both the state and federal courts," Maryland v. Marzullo, 435 U.S. 1011 (1978) denying cert.

to 561 F.2d 540 (4th Cir. 1977) (White and Rehnquist, JJ., dissenting), the federal courts have adopted disparate standards for testing the effectiveness of counsel. The First and Fourth Circuits require that defense counsel render "reasonably competent assistance," "within the range of competence expected of attorneys in criminal cases." United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978). Five Circuits deem representation to be adequate if "reasonably effective assistance" was rendered. Eldridge v. Atkins, 665 F.2d 228, 231 (8th Cir. 1981) ("exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances"); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (reasonably competent and skillful manner), cert. denied, 445 U.S. 945 (1980); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) ("counsel reasonably likely to render and rendering reasonably effective assistance"); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("reasonably competent assistance of an attorney acting as [defendant's] diligent conscientious advocate"), after remand aff'd en banc, 624 F.2d 196 (D.C. Cir. 1979); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960) ("counsel reasonably likely to render and rendering reasonably effective assistance") (emphasis in original), cert. denied, 368 U.S. 877 (1961). The Ninth Circuit requires reasonable competence and a further showing of actual prejudice. United States v. Donn, 661 F.2d 820, 824 (1981). The Third Circuit requires of defense counsel the "exercise of the customary skill and knowledge which normally prevails at the time and place." United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.), cert. denied, 425 U.S. 997 (1976). The Seventh Circuit employs yet another

standard, that the Constitution guarantees a criminal defendant only "a minimum standard of professional representation." United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975). The Second Circuit, now standing alone, continues to apply the strict standard that defense counsel's performance must be not "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." Twitty v. Smith, 614 F.2d 325, 333 (2d Cir. 1979), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

That divergent standards are applied by the courts to measure so fundamental a right as that of an accused to be heard by counsel is alone reason for this Court to accept the present opportunity to enunciate the appropriate standard to be employed. Additionally, the present petition strikingly demonstrates the even more pressing need for this Court to promulgate minimum standards of performance in a capital case to which the courts can look for guidance in assessing whether a defendant has been afforded his constitutional right to the effective assistance of counsel.

In the present case, the performance of appointed co-counsel is most shocking. As set forth in detail above (Statement of the Case, at pages 23-33, supra), despite the facts of this case, counsel failed to raise any challenge before trial to the legality of petitioner's arrest, failed to move for further psychiatric evaluation or hearings to determine petitioner's mental competence to stand trial or to act as his own lead counsel, failed to present a defense of insanity, and failed to object to the admission of inflammatory evidence such as actual corpse fragments and an over ten year old arrest of petitioner, and to

other instances of egregious prosecutorial misconduct and to the court's patently erroneous charges on intent.

Moreover, defense counsel failed to adequately pursue the question of jurisdiction which the court invited him to contest on a question it considered "so close" on whether jurisdiction for the homicide of Gail Jackson lay in the federal or state courts.

Yet, despite such overwhelming evidence of incompetence, the state habeas corpus court below determined that counsel's performance "easily [met]" the governing standard of "counsel reasonably likely to render and rendering reasonably effective assistance." Order, Superior Court of Butts County, supra at 12, citing MacKenna v. Ellis, supra, and Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

This deprivation of petitioner's Sixth Amendment rights requires the attention of this Court of last resort; "in the last analysis, it is this Court's responsibility to determine what level of competence satisfies the constitutional imperative." Maryland v. Marzullo, 435 U.S. at 1012.

POINT V

THE ORDER OF THE COURT ABSOLUTELY BARRING EVIDENCE OF PETITIONER'S MENTAL STATE OFFERED IN MITIGATION AT A DEATH PENALTY HEARING VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS

At the sentencing phase of the trial, where the jury was to consider recommending the death penalty, the court absolutely barred defense counsel from introducing any evidence of petitioner's mental state in mitigation of such penalty. See Statement of the Case, at pages 34 - 35, supra. At the habeas corpus hearing, the state court upheld the exclusion of such

evidence saying that it "was irrelevant in the sentencing phase . . . ." Order, Superior Court of Butts County, entered July 29, 1981, ¶¶ 25-26, at 8, certificate of probable cause to appeal denied (Ga. Sup. Ct. Oct. 9, 1981).

In January, 1982, this Court ruled that the Oklahoma courts had erred in failing to take a young offender's disturbed emotional state and deprived family background into account as mitigating factors in the decision to impose the death penalty. Eddings v. Oklahoma, ____ U.S. ____, 102 S. Ct. 869 (1982). The Court stated that the Eighth Amendment, as interpreted in Lockett v. Ohio, 438 U.S. 586 (1978), requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor . . . ." Eddings v. Oklahoma, supra, 102 S. Ct. at 875. See also Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion) ("[T]he jury's attention is directed to the characteristics of the person who committed the crime: . . . Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., . . . his emotional state at the time of the crime)," quoted with approval in Eddings, supra, 102 S. Ct. at 874 n.6.

The record here reveals that at the sentencing phase, defense counsel tried to present evidence of petitioner's disturbed mental and emotional state both at the time of the crime and during the trial (Tr. 1125, 1127-28). Defense counsel stated at the sentencing hearing:

> Your Honor, the defendant's state of mind at the time of the trial and the time of the commission of the crime, all those things are to be considered in this stage of the trial (Tr. 1127-28).

Unpersuaded, the trial judge barred the presentation of any evidence on defendant's mental state at a sentencing hearing where

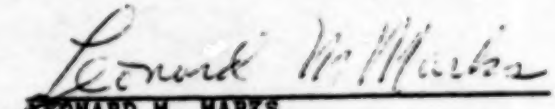
the jury was being asked to recommend the death penalty (id.). The court's patently erroneous order violated the petitioner's Eighth Amendment rights as delineated by this Court in Eddings v. Oklahoma, supra.

The instant case presents the question of whether the recent holding in Eddings, where the trial judge alone weighed the evidence of aggravating and mitigating circumstances, applies equally to a case where a jury must decide whether to impose the death penalty, and the judge bars the presentation of mitigating circumstances.* To consider the application of Eddings to a jury trial, petitioner respectfully requests this Court to grant a writ of certiorari. In the alternative, petitioner respectfully requests that this Court summarily grant this petition for a writ of certiorari and remand the case in light of Eddings.

CONCLUSION

Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,



LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

---

* The issue also entails consideration of whether a new sentencing hearing or new trial is the appropriate remedy since the original sentencing jury has been discharged.

MARTIN R. GOLD
HOWARD L. WIEDER
PAUL V. LiCALSI
JANE G. STEVENS
595 Madison Avenue
New York, New York 10022

Attorneys for Petitioner

Dated: March 8, 1982
New York, New York

CERTIFICATE OF SERVICE

I, LEONARD M. MARKS, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Petitioner, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Petition for Writ of Certiorari with Volumes I and II of Appendices to the Petition upon the Respondents by depositing a copy of same in the United States Mail, with first-class postage prepaid, with proper address to:

Hon. Michael Bowers
State Law Department
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Att'n: Mary Beth Westmoreland, Esq.

Hon. William J. Smith
District Attorney
Post Office Box 1340
Government Center
Columbus, Georgia 31902

I further certify that in accordance with the Rules of this Court, all parties required to be served have been served. This 8th day of March, 1982.

Leonard M. Marks

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

RECEIVED
MAR 10 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 81-6352

(No. A -)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

MOTION TO PROCEED
IN FORMA PAUPERIS

The petitioner, William Henry Hance, by his undersigned counsel, requests leave to file the enclosed petition for a writ of certiorari to the Superior Court of Butts County, State of Georgia without prepayment of fees and costs or the giving of security therefor and to proceed in forma pauperis pursuant to Rule 46 of the Supreme Court of the United States. The affidavits of petitioner and of undersigned counsel are attached in support of the motion. Leave to proceed in forma pauperis was sought in the Superior Court of Butts County, State of Georgia, and such leave was granted.

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

No. 81 -

(No. A -)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS ON PETITION FOR WRIT OF CERTIORARI

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEONARD M. MARKS, being duly sworn, deposes and says:

1. I am the counsel of record for William Henry Hance, the petitioner in the above-captioned action, who requests leave to file the enclosed petition for a writ of certiorari to the Superior Court of Butts County, State of Georgia, without prepayment of fees and costs or the giving of security therefor and to proceed in forma pauperis. I make this affidavit in support of the motion.

2. The affidavit of the petitioner himself, William Henry Hance, sworn to on February 23, 1982, is annexed hereto in support of the motion. As his affidavit attests, petitioner

is in poverty and is unable to prepay the fees and costs for the filing of the instant petition or to give security therefor. I believe that he is in poverty, owns no real or personal property, receives no income from earnings, is unable to prepay the fees and costs for the filing of the petition, or to give security therefor, and qualifies for in forma pauperis relief. The petitioner is incarcerated in the Georgia Diagnostic & Classification Center in Jackson, Georgia, awaiting execution.

3. Because of his poverty, the petitioner has never been able to pay for counsel or any court fees throughout the proceedings in the Georgia courts. At trial, the court appointed lawyers from the Office of the Public Defender of Muscogee County, Georgia, to sit with him. On a motion for a new trial and direct appeal, the court appointed the same lawyers to represent him. On state habeas corpus relief, he was represented by volunteer counsel, and the Superior Court of Butts County, State of Georgia, permitted petitioner to file the state habeas corpus petition without prepayment of costs and to proceed in forma pauperis.

4. I, as Counsel of Record, and the other attorneys for petitioner listed on the petition for a writ of certiorari are undertaking petitioner's legal representation without any remuneration.

5. I further state that each of the questions presented in the petition for certiorari are of federal constitutional stature and merit the attention of this Court.

6. I, therefore, respectfully request that this Court grant the motion for petitioner to file the enclosed

petition without prepayment of fees and costs or the giving of security therefor and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States.

LEONARD M. MARKS
Counsel of Record

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

The foregoing affidavit of Leonard M. Marks was subscribed and sworn to before me this 5th day of March, 1982.

HOWARD LLOYD WIEDER
Notary Public

HOWARD LLOYD WIEDER
Notary Public, State of New York
No. 41-4714803
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1982

No. 81-
(No. A-)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and GEORGIA,

Respondents.

I, WILLIAM HENRY HANCE, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. My counsel, Leonard M. Marks, Esq., and his law firm of Gold, Farrell & Marks, are representing me in this Court without remuneration.

5. At trial, the court appointed lawyers to sit with me. On motion for a new trial and direct appeal, the court appointed counsel to represent me. On state habeas corpus relief, I was represented by volunteer counsel, Stephen A. Kermish, Esq., and the court permitted me to file the state habeas corpus petition without prepayment of costs and to proceed in forma pauperis.

6. I believe that several errors of constitutional magnitude occurred at trial and that I am entitled to redress.

7. The nature of said cause is briefly stated as follows:

I was tried in the Superior Court of Muscogee County, a trial court of the State of Georgia, on December 11-16, 1978, for murder and attempted theft by extortion. I was convicted of both charges and was sentenced to death in the electric chair for murder and to five years imprisonment for attempted theft by extortion. I am being held at the Georgia Diagnostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

William Henry Hance
WILLIAM HENRY HANCE

STATE OF GEORGIA)
) ss.:
COUNTY OF BUTTS)

The foregoing affidavit of William Henry Hance, was subscribed and sworn to before me this 23 day of February, 1982.

Aaron Kosemore
NOTARY PUBLIC

My Commission Expires
4-20-83

CERTIFICATE OF SERVICE

I, LEONARD M. MARKS, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Petitioner, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Motion to Proceed In Forma Pauperis with supporting affidavits upon the Respondents by depositing a copy of same in the United States Mail, with first-class postage prepaid, with proper address to:

Hon. Michael Bowers
State Law Department
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Att'n: Mary Beth Westmoreland, Esq.

Hon. William J. Smith
District Attorney
Post Office Box 1340
Government Center
Columbus, Georgia 31902

I further certify that in accordance with the Rules of this Court, all parties required to be served have been served. This 8th day of March, 1982.

Leonard M Marks

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200